STATE OF MICHIGAN

COURT OF APPEALS

EUREKA INTERNATIONAL, L.L.C., and WELLINGTON SPRINGFIELD, L.L.C.,	UNPUBLISHED September 15, 2009
Plaintiffs-Appellants,	
v	No. 284862 Wayne Circuit Court
CITY OF ROMULUS,	LC No. 06-614033-CZ
Defendant-Appellee.	

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant. On appeal, plaintiffs argue that the trial court improperly concluded that plaintiffs had not presented evidence raising genuine issues of material fact with regard to each of plaintiffs' claims. We affirm.

On September 3, 1998, plaintiffs purchased three contiguous parcels of land one mile west of the Detroit Metro Airport, within the city of Romulus, totaling almost 90 acres. The total cost of the purchase was $1.5 million. Almost all of the property is zoned M-1 Light Industrial ("M-1"). It lies between property zoned for residential use on one side and heavier industrial use on the other side. The land was undeveloped; plaintiffs' plan was to develop the property as an "intermodal warehouse/distribution facility" with "convenient access to air, rail and road transportation routes" for sale to commercial buyers.

On June 12, 2001, the city of Romulus amended the restrictions associated with the M-1 zoning classification. The new classification limited structures built on the land to a maximum of 40,000 square feet, containing a maximum of 13 truck bay doors. The previous classification contained no such restrictions. Plaintiffs sought to build approximately one million square feet of warehouse space. They acknowledged that the M-1 zoning classification would allow them to build that much warehouse space in approximately 25 buildings, but they preferred to build only two or three warehouses because they considered buildings smaller than 40,000 square feet to be unmarketable. Thus, on December 13, 2005, they sought to have the zoning classification on the property changed to MT-2 Industrial Transportation District ("MT-2"). MT-2 has no size or truck bay door restrictions.

The city council, after receiving a recommendation from the city planning commission, denied the rezoning request, citing the following reasons, originally proffered by the city's planning consultant:

> The first, the MT-2 is not consistent with the goals and objectives of the Master Plan and is completely contrary to the intent and purpose behind the Future Land Use designation for the site.
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> Second, there is no demonstration that the site cannot be developed under current M-1 light industrial zoning.
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> Third, the applicant has not demonstrated uses in MT-2 cannot be accommodated elsewhere in the city.
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> Four [sic], uses permitted in the MT-2 district will guarantee extensive clearing and grading of natural resources on the site and is therefore incompatible with the site's environmental conditions.
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> Five [sic], uses permitted in the MT-2 district would adversely impact adjoining residential areas due to views of truck loading and storage areas, noise, odors, and truck traffic generated. MT-2 is not an appropriate land use transition to be placed adjacent to residential.

Plaintiffs were also denied an appeal by the city's zoning board of appeals.

On appeal, plaintiffs first argue that the trial court improperly granted summary disposition in favor of defendant on plaintiffs' substantive due process claim because plaintiffs presented sufficient evidence to raise a genuine issue of material fact regarding whether the city's denial of the rezoning application was arbitrary and capricious or not in furtherance of a reasonable governmental interest. We disagree.

On appeal, a decision to grant a motion for summary disposition is reviewed de novo. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in the same manner as the trial court. *Id.* Any court considering such a motion must consider all the pleadings and the evidence in a light most favorable to the nonmoving party. *Id.* The motion tests whether there exists a genuine issue of material fact. *Id.* "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). Issues of law are reviewed de novo. Id.

Plaintiffs first argue that the trial court failed to properly consider their argument that it was defendant's denial of rezoning that constituted a substantive due process violation, rather than the creation of the M-1 zoning classification in the first place. The trial court treated plaintiffs' claim as a challenge to the reasonableness of the existing zoning classification. Plaintiffs energetically argue that the trial court misapprehended the nature of their claim, evading the crux of their argument. They argue that the violation of substantive due process lies not in the original zoning classification established by the city of Romulus but in the denial of

plaintiffs' application to change the zoning classification of their property; they argue that this action was done arbitrarily and capriciously, and unjustified by any reasonable governmental interest.

We note that plaintiffs are making a distinction without a difference. While the bulk of Michigan jurisprudence relating to substantive due process claims in land use cases frames the question as a "challenge to a zoning ordinance," see, e.g., *Kropf v Sterling Heights*, 391 Mich 139, 157; 215 NW2d 179 (1974); *Yankee Springs v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004), further examination reveals that the same standards are applied to cases in which a landowner challenges the denial of a rezoning request, see *A & B Enterprises v Madison*, 197 Mich App 160, 161-162; 494 NW2d 761 (1992) (explicitly applying same framework to challenge of denial of rezoning). Moreover, there is no substantive difference between these kinds of claims. In either case the landowner is asserting that the existing zoning classification is not reasonable and justified, whether the unreasonableness is manifested as the original creation of the classification or the subsequent affirmation of the classification by the municipality's denial of a rezoning request. Further, in either case the landowner is seeking to demonstrate that *another* classification is more appropriate for the land. Compare *Yankee Springs, supra* at 609-610 with *A & B Enterprises, supra* at 162-163. Finally, because this Court's review of a trial court's grant of a motion for summary disposition is de novo, the trial court's approach to the issue is not dispositive.

In *A & B Enterprises, supra* at 162, this Court wrote:

> In order to successfully challenge a zoning ordinance, a plaintiff must prove (1) that there is no reasonable governmental interest being advanced by the present zoning classification, or (2) that the ordinance is unreasonable because of a purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration. . . .
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> . . . Judicial review of a substantial due process challenge requires application of three rules: (1) the ordinance is presumed valid; (2) the challenger has the burden of providing that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property . . . ; and (3) the reviewing court gives considerable weight to the findings of the trial judge.

Further, this Court has recently emphasized that "[t]o sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Mettler Walloon v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008). Moreover, the Due Process Clause "is not a guarantee against incorrect or ill-advised [governmental] decisions." *Bishop v Wood*, 426 US 341, 350; 96 S Ct 2074; 48 L Ed 2d 684 (1976).

Plaintiffs argue that they presented sufficient evidence to create a question of fact regarding each of defendant's reasons for denying plaintiffs' application to rezone the property. They argue first that defendant's reliance on its master plan was irrational and arbitrary. Defendant's master plan designates the future use of plaintiffs' property as one-half light residential and one-half dense residential. Plaintiffs argue that this plan for future use is unreasonable and, therefore, reliance upon the plan to deny plaintiffs' application is

unreasonable. Plaintiffs argue that they presented evidence that the property is not suitable for human habitation because of noise levels related to the nearby air, rail, and road traffic. They also argue that their planning expert established that the master plan does not consider the established industrial character of the entire area.

The parties agree that the property currently lies between a residential and an industrial zone; it is currently zoned for light industrial uses, which defendant has defined is to be used as a buffer between residential and heavy industrial zones. Defendant's future land use map focuses industrial areas on the eastern side of the airport, leaving the area of plaintiffs' property designated as rural estate, and low- and high-density residential areas. Clearly, the future land use plan demonstrates that defendant has an interest in *not* expanding the industrial use of land around plaintiffs' property. Contrary to plaintiffs' assertion, this interest does not ignore the current character of the land; rather, it allows defendant to balance the current use of plaintiffs' property as a buffer with its future use as residential property.

Further, plaintiffs are correct that they have presented some evidence that current noise levels are outside of the "normally acceptable" range for a residential area, but we are not convinced that there is evidence that defendant's conduct "shocks the conscience." The site noise study presented by plaintiffs shows that *part* of plaintiffs' property falls within the "normally unacceptable" noise range, but not the "clearly unacceptable" range. Further, part of the property is "normally acceptable." Finally, the study is for current noise levels. Plaintiffs have presented no evidence that existing noise conditions will be applicable to defendant's aspirational land use. It is plaintiffs' burden to demonstrate that defendant acted in an arbitrary and capricious manner. *A & B Enterprises*, *supra* at 162. There is no indication that plaintiffs have presented evidence to demonstrate that defendant's *partial* reliance on its master plan was arbitrary and capricious.

Plaintiffs next argue that they have presented evidence that the property could not be developed as zoned. Plaintiffs' evidence purports to demonstrate that M-1 zoned property is less marketable than MT-2 zoned property within the city of Romulus. However, defendant's stated justification was that "there is no demonstration that the site cannot be developed under current M-1 light industrial zoning." Indeed, plaintiffs admit that they could develop the same amount of warehouse space and truck bay doors, albeit in a less efficient way, under the current zoning classification that they wish to develop under the proposed classification. Further, while smaller industrial buildings, according to plaintiffs' evidence, are less marketable than larger industrial buildings, there is no indication that smaller industrial buildings are not marketable at all. Again, the city merely stated that there is no evidence that the property *cannot be developed* as zoned. Plaintiffs have not presented any evidence counter to this.

Plaintiffs next argue that they presented evidence that they could not construct their proposed development anywhere else in the city of Romulus. Plaintiffs presented evidence that there is currently no other vacant property in Romulus that is: (1) within a five mile radius of the airport, (2) a minimum of 80 acres, (3) zoned MT-2 or M-2, (4) has direct access to a major expressway, and (5) has direct rail access. Assuming plaintiffs' evidence to be true, it *is* literally true that plaintiffs could not find this exact description of property within the city limits of Romulus. Nevertheless, the reason given by the city is that plaintiffs failed to demonstrate that MT-2 uses could not be accommodated elsewhere in the city; defendant did not refer to specific collection of attributes that *plaintiffs* deem most important. Thus, the reason given by the city is

not contradicted by plaintiffs' proffered evidence. Plaintiffs have not presented evidence that MT-2 uses could not be accommodated elsewhere in the city.

Plaintiffs next argue that they presented evidence that defendant's environmental concerns were unfounded. Plaintiffs argued that they presented evidence that residential development of the property is not feasible and that M-1 light industrial development is unmarketable; thus, they argue that the wetland mitigation required for either of those types of development would not be cost-effective. Again, plaintiffs' proffered evidence does not contradict defendant's conclusion. The stated reason is: "[U]ses permitted in the MT-2 district will guarantee extensive clearing and grading of natural resources on the site and is therefore incompatible with the site's environmental conditions." First, the property is zoned for light industrial and there is no current proposal to develop it as residential property. Plaintiffs' argument in this regard is a red herring; the city made no claim that it would be environmentally beneficial to *currently* rezone the property for residential development.

Further, plaintiffs' proffered evidence is that M-1 light industrial development is unmarketable. This claim is premised on the fact that one conclusion of plaintiffs' marketing study was that occupancy rates of buildings larger than 60,000 square feet (not permitted by M-1 zoning) are higher than that of those smaller than 60,000 square feet. Assuming this evidence to be true, this nevertheless fails to demonstrate that smaller buildings are wholly "unmarketable," only that they are less marketable. Further, the study was only regarding the size of industrial buildings, not the full complement of allowed land usage contemplated by the different zoning classifications. Defendant's concern was that "uses permitted in the MT-2 district" would be environmentally detrimental, not that plaintiffs' specific proposed larger warehouses were more environmentally detrimental than smaller M-1-compliant warehouses. Thus, they concluded that rezoning the property would be imprudent. Plaintiffs have failed to demonstrate that this conclusion was the fruit of an arbitrary and capricious decision-making process.

Finally, plaintiffs argue that they have presented evidence that their development would not adversely affect adjacent residential zones. They argue that because there are other industrial zones adjacent to residential zones, this factor is not justified. As stated in the zoning ordinances, the purpose of the M-1 zoning classification is to provide a buffer between residential and heavy industrial uses. Plaintiffs have not provided any evidence that this requires that all residential areas in Romulus be buffered by an M-1 zone. Nor have they provided evidence of how the counterexamples they proffer were created. There is no indication that defendant has chosen to arbitrarily and capriciously maintain its use of the M-1 zone for the purposes for which the classification was created.

We conclude that plaintiff failed to raise any genuine issue of material fact regarding the propriety of each of defendant's explanations for their denial of the rezoning application. Accordingly, there was no genuine issue of material fact regarding whether the denial, itself, was a violation of plaintiffs' right to substantive due process.

Plaintiffs next argue that defendant's conduct perpetrates a constitutional taking. Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). An inverse condemnation, alleged by plaintiff, occurs when a government entity "effectively takes private property without a formal

condemnation proceeding," *Merkur Steel Supply v Detroit*, 261 Mich App 116, 125; 680 NW2d 485 (2004) (de facto taking), or when the government overburdens the property with regulations, *K & K Construction v DNR*, 456 Mich 570, 576; 575 NW2d 531 (1998); *Dorman, supra* at 646 (regulatory taking).

A regulatory taking occurs in two general factual scenarios: "(1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of the land." *K & K, supra* at 576. Further, in the second scenario, the taking may be accomplished categorically—where the property owner is denied *all* economically viable use of the land, or according to a balancing test between "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Id*. at 577, citing *Penn Central Transportation Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). With regard to the economic effect prong of this balancing test, "a mere diminution in property value . . . does not amount to a taking." *Bevan v Brandon Twp*, 438 Mich 385, 402-403; 475 NW2d 37 (1991).

Plaintiffs argue that they presented sufficient evidence to raise a genuine issue of material fact regarding both the economic effect of defendant's regulations and the extent to which the regulations have interfered with their investment-backed expectations. The trial court concluded that plaintiffs' evidence did not demonstrate that defendant's conduct led to more than a "mere diminution" in the value of the property, and that plaintiffs presented no evidence of investment-backed expectations.

Plaintiffs argued that the marketing study they proffered demonstrated that the property, under M-1 zoning, was worthless because of the "high" vacancy rate of warehouses smaller than 60,000 square feet in Romulus. Actually, the evidence only demonstrated that smaller warehouses were slightly more likely to be vacant than larger warehouses, but that it was far from true that all smaller warehouses were vacant. The vacancy rate is 30 percent. Further, the study also indicated that properties zoned M-1 had been sold in recent years within Romulus. While this evidence might demonstrate that property zoned MT-2 would be *more* valuable than property zoned M-1, it does not raise a genuine issue of material fact whether the property is *worthless* under the M-1 zoning classification. *Bevan, supra* at 402-403.

Plaintiffs also argue that they presented evidence that defendant's actions interfered with distinct, investment-backed expectations. One of plaintiffs' principals testified that he made plaintiffs' development plans known to two city officials prior to his purchase of the property, with no objection. Further, plaintiffs argue that their purchase of the property represents the backing investment in the development project. We agree with the trial court that this evidence falls short of creating a *distinct*, investment-backed expectation in the specific development plaintiffs seek. Plaintiffs were aware of the M-1 zoning classification when they purchased the property. See *K & K Construction v DEQ*, 267 Mich App 523, 555-556; 705 NW2d 365 (2005) (notice is a factor in the reasonableness of party's expectations). Subsequently, plaintiffs have presented no evidence that they actually engaged in planning, development or construction of their development. They have no prospective buyers or users for their proposed development. They have not received any permits from the city in support of their proposed development. Their "expectation" is simply their desire to develop the property differently than the property is

zoned. This evidence does not raise a genuine issue of material fact regarding whether defendant's conduct interfered with plaintiffs' distinct, investment-backed expectations.

There is no genuine issue of material fact regarding whether the zoning regulations in this case constituted a taking under the three-prong balancing test of a regulatory taking. *K & K*, *supra* at 570.

Plaintiffs next argue that the denial of the rezoning request constituted an equal protection violation because a similarly situated property owner, Liberty Properties, was granted a variance to build warehouses exceeding the limits of the M-1 classification. Zoning regulations, or their enforcement, may violate equal protection if similarly situated parties are not treated alike. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 427; 761 NW2d 371 (2008); *Shepherd Montessori v Ann Arbor Twp*, 259 Mich App 315, 337; 675 NW2d 271 (2003), rev'd in part on other grounds 480 Mich 1143 (2008).

We conclude that plaintiffs did not present evidence that they were similarly situated to Liberty Properties with respect to their requests to defendant. It is undisputed that the two properties were zoned M-1 and were adjacent to residential areas. Liberty Properties had already constructed a 232,000 square foot building before the 2001 40,000-square-foot limitation on M-1 zoned property. They sought a variance to continue their planned development and build two further buildings totaling 600,000 square feet. Plaintiffs had a vacant property and sought to have their property rezoned to MT-2, in part to construct warehouses totaling over one million square feet. A primary factor in the denial of plaintiffs' rezoning request was the desire to maintain M-1 light industrial zoning between residential and heavier industrial zones. Plaintiffs' request runs directly against this goal, whereas Liberty Properties only requested a dimensional variance.

Plaintiffs claim that defendant's "version of events" is unsupported by any evidence and that the trial court improperly credited defendant's version over plaintiffs' version. On the contrary, defendant presented an affidavit from the city planner testifying regarding the events of Liberty Properties' zoning variance and plaintiffs have not offered any evidence to dispute that. While evidence should be viewed in the light most favorable to the non-moving party at the summary disposition phase, this does not invite the court to ignore uncontroverted evidence merely because it militates in favor of the moving party. Plaintiffs have not presented any evidence that Liberty Properties and the variance granted to it were qualitatively similar to plaintiffs and their request to rezone their property. The trial court did not err in granting summary disposition on this count.

Plaintiffs finally argue that they presented sufficient evidence to raise a genuine issue of material fact regarding whether three members of the city planning commission and city council were impermissibly biased against plaintiffs' request for rezoning. Procedural due process requires that a party receive a hearing before an "unbiased and impartial decision-maker." Our Supreme Court has identified four situations that present a high probability of bias:

> (1) has a pecuniary interest in the outcome;
>
> (2) has been the target of personal abuse or criticism from the party before him;

(3) is enmeshed in [other] matters involving petitioner;

(4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision-maker. [*Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975) (internal quotation marks and citations omitted); see also *Kloian v Schwartz*, 272 Mich App 232, 244-245; 725 NW2d 671 (2006).]

"Although not exclusive, the *Crampton* categories should be narrowly interpreted in light of examples provided by the Supreme Court and are 'not to be viewed as catch-all provisions for petitioners desiring disqualification.' " *Van Buren v Garter Belt, Inc*, 258 Mich App 594, 600; 673 NW2d 111 (2003), quoting *Cain v Dep't of Corrections*, 451 Mich 470, 500 n 36; 548 NW2d 210 (1996). Plaintiffs complain that the three individuals expressed concerns about the effects of plaintiffs' proposed development on their own neighborhoods, which lie near plaintiffs' property, at the meetings regarding plaintiffs' application. They contend that their statements indicate the potential for bias.

In all three cases, the individuals merely demonstrated that they had personal knowledge of the impact that such a development would have on the area, due to the fact that they live in the area. None of the individuals ever indicated any personal animosity toward plaintiffs or the project, outside of the *effects* that the project would have—precisely their role as the decision-makers in the land use context. Further, the individuals' interest in the effects of the proposed development would be only logical given the nature of such local bodies of governance. The illustrative examples of Crampton contemplate situations where the decision-maker brings an interest to the decision-making process that is strictly personal and disconnected from the community interest, such as personal pecuniary interest, prior involvement with the party, or a demonstration of personal animosity between the party and the decision-maker. *Crampton, supra* at 356; see also *Michigan Intra-State Motor Tariff Bureau v MPSC*, 200 Mich App 381, 391-392; 504 NW2d 677 (1993) ("A decision-maker may be familiar with the facts of a case and need not be disqualified even after having taken a position regarding a related policy issue."). It would be an onerous burden to require local planning commission members to be completely *disinterested* from all matters before it, given the local nature of the body.

Plaintiffs have not pointed to any statement or conduct by any members of the planning commission or city council that demonstrates a genuine issue of material fact regarding an "unconstitutionally high" probability of actual bias in this case.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra